Re Foursea Construction (M) Sdn Bhd

HIGH COURT (KUALA LUMPUR) — EX PARTE ORIGINATING SUMMONS NO D6-24-259 OF 1998
KL REKHRAJ J
22 JUNE 1998

Companies and Corporations *— Arrangement, scheme of — Arrangement between company and creditors — Pending winding-up proceedings — Whether an application under s 176(1) could be dealt with ex parte — Companies Act 1965 s 176(1) & (10)*

The applicant filed an ex parte originating summons under s 176(1) and (10) of the Companies Act 1965 ('the Act') for an order that the applicant be directed to convene meetings in respect of its creditors for the purpose of considering the scheme of arrangement proposed to be made between the applicant and its creditors. There were already on record several winding-up petitions pertaining to the applicant pending hearing in the High Courts.

Held, dismissing the application:

(1) An application under s 176(1) must be dealt with summarily, ie by hearing inter partes, with an opportunity given to the known creditors on record to make their representation, and not ex parte, as by so proceeding, great injustice is caused to the creditors who are legally entitled to enforce execution proceeding (ex debito justitiae) and are thus put to further unnecessary expense in setting aside the orders (see p 103G).

(2) An application under s 176(1) gives the court the discretion only if there are no winding-up proceedings initiated prior to the application. If there are such winding-up proceedings, then any such application must be made in the very winding-up proceedings by making the petitoners and the supporting creditors, if any, as parties thereto. The presiding judge in the winding-up court would then have before him the wishes of all the creditors or contributories in coming to some conclusion by either making the order for arrangement and/or reconstruction and thus granting a stay under s 222 of the Act; or refuse the application and instead wind up the company (see pp 103H–I and 104A).

[Bahasa Malaysia summary

Pemohon memfailkan satu saman pemula ex parte di bawah s 176(1) dan (10) Akta Syarikat 1965 ('Akta tersebut') untuk satu perintah bahawa pemohon diarahkan bersidang berhubung dengan pemiutangnya untuk tujuan mempertimbangkan skim perkiraan yang dicadangkan dibuat antara pemohon dan pemiutangnya. Sudah pun terdapat beberapa petisyen penggulungan atas rekod mengenai pemohon yang menunggu pembicaraan di Mahkamah Tinggi.

Diputuskan, menolak permohonan:

(1) Suatu permohonan di bawah s 176(1) mestilah diuruskan secara terus, iaitu pembicaraan inter partes, dengan peluang diberikan kepada pemiutang atas rekod yang dikenali untuk membuat representasi mereka, dan bukan ex parte, kerana dengan berbuat begitu, ketidakadilan dilakukan kepada pemiutang yang berhak di sisi undang-undang untuk menguatkuasakan prosiding pelaksanaan (ex debito justitiae) dan dengan itu terpaksa menanggung perbelanjaan lanjut yang tidak perlu dalam mengetepikan perintah-perintah (lihat ms 103G).

(2) Suatu permohonan di bawah s 176(1) memberikan budi bicara kepada mahkamah hanya jika tiada prosiding penggulungan yang dimulakan sebelum permohonan. Andainya terdapat prosiding penggulungan sedemikian, maka sebarang permohonan mestilah dibuat dalam prosiding penggulungan yang sama dengan menjadikan pempetisyen dan pemiutang yang menyokong, jika ada, sebagai pihak-pihak dalamnya. Hakim yang bersidang di mahkamah penggulungan kemudiannya akan mempunyai kehendak kesemua pemiutang atau pencarum dalam mencapai keputusan dengan sama ada membuat perintah untuk perkiraan dan/atau pembentukan semula dan justeru itu memberikan penggantungan di bawah s 222 Akta tersebut; atau menolak permohonan dan sebaliknya menggulungkan syarikat itu (lihat ms 103H–I dan 104A).]

Notes

For cases on scheme of arrangement, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 18–24.

Legislation referred to

Companies Act 1965 ss 176(1), (10), 177(1)(a), 222

Conrad Young (*Azman Davidson & Co*) for the applicant.
Prakash Mehta (*Prakash Baljit & Co*) for the intervener.

KL Rekhraj J: The applicant filed this ex parte originating summons under s 176(1) and (10) of the Companies Act 1965 for an order that:

(i) the applicant be directed to convene separate meetings to be held in respect of its two classes of creditors described as the secured creditors and unsecured creditors for the purpose of considering and if thought fit approving with or without modification the scheme of arrangement proposed to be made between the applicant and its creditors;

(ii) the said meetings are to be held on or before 4 September 1998 between the hours of 9am and 5pm;

(iii) the applicant be at liberty to fix an earlier date and the venue of the meetings;

(iv) Mr Lim Ming Woei, a director of the applicant, or failing him Mr Yaw Kong Meng, a director of the applicant be appointed as chairman of the said meetings and the said chairman be directed to report the results thereof to this honourable court;

(v) the said meetings be summoned by the giving of not less than 21 days notice and that such notice be given by way of:

(a) sending by ordinary mail the notice in the form annexed herewith as Annexure 1 with the blanks appropriately filled therein to the last known address of each of the creditors and/or their solicitors' address for service; and

(b) advertising the notice in the form annexed herewith as Annexure 2 once in English in *The Star* newspaper and once in Bahasa Malaysia in the *Berita Harian* newspaper;

(iv) notice of the said meetings be deemed to have been duly effected only upon two clear days of the posting of the said notices to the creditors' last known address and/or their solicitors' address for service and after the publication of the advertisements;

(vii) the applicant by itself or through its agents do send a copy of the said scheme and the corresponding statement required to be furnished pursuant to s 177(1)(a) of the Companies Act 1965 together with the form of proxy and form of proof of debt ('the applicant's documents') to all the applicant's creditors together with the notice annexed as Annexure 1 and also to any creditor who files a proof of debt in compliance with the requirements of the advertisements;

(viii) in addition to the above, the applicant and its agents are to make available to all the applicant's creditors copies of the applicant's documents which can be obtained from the applicant's office at No 19B, Lorong Rahim Kajai 13, Taman Tun Dr Ismail, 60000 Kuala Lumpur, on any working day except Saturday between the hours of 9.00 am and 5.00 pm;

(ix) pursuant to s 176(10) of the Companies Act 1965:

(a) the petitioners — the plaintiffs — their servants or agents to the actions or proceedings against the applicant more specifically set out in exh YKM–6 (being the list of creditors) to the affidavit of Yaw Kong Meng affirmed on 15 June 1998; and/or

(b) any of the applicant's creditors, their servants or agents;

be restrained except by leave of this court and subject to such terms as this court may impose, from all further action or further proceedings as well as any intended or future proceedings including winding-up, execution or arbitration proceedings ('the said restraining order') pending the approval of the scheme by the court or until further order;

(x) service of the said restraining order be effected:

(a) on all persons affected by the restraining order; and

(b) if such person is a company, on the company as well as on its directors;

by way of advertising a copy of this order without the annexures thereto, once in English *The Star* newspaper and once in Bahasa Malaysia in the *Berita Harian* newspaper and also by way of sending by ordinary mail to the last known address of such affected person and/or company a photocopy of the restraining order without the annexures thereto;

(xi) service of the said restraining order be deemed effected only upon two clear days of the posting of the said restraining order and after publication of the said restraining order in the said newspapers; and

(xii) such further directions or orders be given as deemed fit by this honourable court.

This ex parte application was supported by an affidavit of Yaw Kong Meng, the director of the applicant company deposing that:

(i) the authorized; issued and paid-up capital of the company is RM1m; and

(ii) the company has incurred a large amount of debts; showing in the Balance Sheet for December 1997:

Fixed Assets		RM951,665
Current Assets (trade debtor/ other debtor)	1,317,158	
Deposit	1,922,322	RM3,239,480
Current Liabilities		RM11,304,563
Net Current Liabilities		RM7,112,345

(iii) that there are potential investors who at this stage wish to remain unidentified and unnamed but who are willing to inject fresh capital should the scheme be approved by the creditors and sanctioned by the court;

(iv) that the unsecured creditors subject to the scheme being approved shall be paid 20% as follows:

(a) 12 months from effective date 10%;

(b) 24 months from effective date 10%.

The first 10% payment to be made from the expected collection of their claims and they must undertake to give up their claim on the remaining 80%.

A It was also learnt in the course of the hearing, that there are on record three winding-up petitions, pending hearing in the High Courts Kuala Lumpur as:

(i) D6–28–83–98 fixed for 24 June 1998;

(ii) D4–28–474–97 fixed for 26 June 1998; and

B (iii) D3–28–21–98 fixed for 23 September 1998

The applicant had earlier on 18 March 1998, prior to the presentation of this second ex parte application, proceeded to file an ex parte Originating Summons No D2–24–104–98 for an order that all proceedings pending against the company, including the winding-up petitions heretofore referred, C be restrained pending the implementation of the proposed scheme; and in view of the obvious urgency of the matter, the said application be and was disposed of ex parte.

The High Court judge in D2–24–104–98 granted the order but limited it for a period of three months, expiring on 23 June 1998.

D I obviously would have expected the applicant's solicitors to go to the very D2 Court for any enlargement of time, or for any other prayers, instead of filing a fresh ex parte originating summons in the circumstances.

Upon hearing, I refused the application and dismissed it because s 176(1) of the Companies Act 1965 reads:

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> Where a compromise or arrangement is proposed between a company and its creditors or any class of them or between the company and its members or any class of them the court may on the application in a summary way of the company or of any creditor or member of the company, or in the case of a company being wound up of the liquidator, order a meeting of the F creditors or class of creditors or of the members of the company or class of members to be summoned in such manner as the court directs.

Such an application under the section must be dealt with summarily, ie by hearing inter partes, with an opportunity given to the known creditors on record to make their representation, and not ex parte, as by so proceeding, G great injustice is caused to the creditors who are legally entitled to enforce execution proceeding (ex debito justitiae) and are thus put to further unnecessary expense in setting aside the orders.

I am also of the view that s 176(1) application gives the court the discretion only if there are no winding-up proceedings initiated prior to the application; and if there are such winding-up proceedings, then any such H application must be made in the very winding-up proceedings by making the petitoners and the supporting creditors, if any, as parties thereto; and the presiding judge in the winding-up court would then have before him the wishes of all the creditors or contributories in coming to some conclusion by either making the order for arrangement and/or reconstruction and thus I granting a stay under s 222 of the Companies Act; or refuse the application, if satisfied that the company's financial position is one of being a 'hopelessly insolvent', ie it is unable to meet the creditors' current demands and that

it would be against the interest of the commercial world and morality to permit further trading losses which may never be discharged; and instead to wind up the company.

I accordingly dismissed the application.

Application dismissed.

Reported by Loo Lai Mee